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Supreme Court, U.S.
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No. 03-570

In the Supreme Court of the United States

SMITA SANGHVI; TARUN SANGHVI,
Petitioners,

v.

CITY OF CLAREMONT,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioners Smita Sanghvi and Tarun Sanghvi respectfully move, pursuant to Rule 44.2 of the Supreme Court Rules, for rehearing on their Petition for Writ of Certiorari as to the second question presented for review-whether it was reversible error for the district court to instruct the jury on the burden of production framework enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed.2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L. Ed.2d 207 (1981)? In support thereof, Petitioners make the following argument: Effective December 1, 2003, approximately one week prior to this Court's Order on December 8, 2003 denying the Petition for Writ of Certiorari, *Federal Rule of Civil Procedure* 51 was amended to allow a court to consider a plain error in the jury instructions affecting substantial rights that has not been preserved as otherwise required under the rule. *Federal Rule of Civil Procedure* 51(d)(2). The Ninth Circuit Opinion agreed with Petitioners' contention on appeal that the district court erred in its jury instructions and special verdict form, both of which set out the *McDonnell Douglas* burden-shifting framework, but found that the Petitioners waived their challenge to the instructions by failing to object at trial under Rule 51. The Ninth Circuit's well-established case law at the time that the case was decided foreclosed review of the jury instructions under the "plain error" doctrine. Pursuant to this Court's Order dated March 27, 2003, newly amended Rule 51 shall take effect on December 1, 2003, and "shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." There are no impediments barring a federal court's exercise of its

equitable discretion to permit Petitioners the benefit of the newly adopted rule.

I. This Court should grant the Petition for Rehearing based on the unique intervening circumstances of the adoption of newly amended Federal Rule 51 that now permits application of the "plain error" doctrine to cases that are pending *sub judice*.

Earlier this year, this Court adopted an amendment to *Federal Rule of Civil Procedure* 51 that now allows, pursuant to subsection (d)(2), a court to consider the issue of a plain error in jury instructions affecting substantial rights that has not been preserved as otherwise required under the rule. *Federal Rule of Civil Procedure* 51(d)(2).[1] Pursuant to this Court's Order of March 27, 2003, the operative effect of newly amended Rule 51 is December 1, 2003 and permits retrospective application to a case, "insofar as just and practicable" which affects substantial rights and is pending *sub judice*. (App. A, at 2a).

Prior to this Court's incorporation of the "plain error" doctrine in Rule 51, the Ninth Circuit stood alone among the circuits as the strictest enforcer of Rule 51 declaring that there is no "plain error" exception in civil cases. *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991) (*en banc*). Thus,

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[1] The Chief Justice's letter of March 27, 2003 to Vice President Cheney in his capacity as President of the United States Senate advising him of the amendments to the Federal Rules along with the Court's Order dated March 27, 2003 that the amended rules are effective December 1, 2003, and newly amended Rule 51 can be found at *http://www.uscourts.gov/rules/archive.htm*. For convenience of the Court copies of the same taken off the internet website are attached as Appendix "A".

Petitioners were foreclosed from arguing on appeal that even if the error affecting their substantial rights was generally waived under Rule 51, the Ninth Circuit could still consider the issue under the "plain error" doctrine. Petitioners recognize that retroactive application under Rule 51 is not absolute and was qualified by the Court's March 27, 2003 Order to cases insofar as it is "just and practicable." (App. A, 2a).

The term "just and practicable" suggests that retroactive application of Rule 51 depends on the exercise of equitable discretion by the federal courts analogous to the reasoning found in some of the Court's previous case law that has denied retrospective application of a newly announced judicial rule "to avoid injustice or hardship to civil litigants who have justifiably relied on prior law," *cf. American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 199, 110 S.Ct. 2323, 2342, 110 L.Ed.2d 148 (1990) (plurality opinion); *but see Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993) (holding that judicial decisionmaking "prohibit[s] the erection of selective temporal barriers to the application of federal law in noncriminal cases").

However, no justifiable reliance on prior law can be reasonably invoked in the case at bar since prior to the Ninth Circuit Opinion there was no direct case law in the circuit on the issue of whether it is error to charge the jury with the elements of the *McDonnell Douglas prima facie* case and the circuits are split on the issue. (Petition for Writ of Certiorari, App. B at 15a-18a) . Moreover, this Court has held even prior to *Harper* that denial of retroactive effect to a "new principle of law" in order to avoid "'injustice or hardship'" must not unduly undermine the purpose and effect of the new rule. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 92 S.Ct.

349, 355-356, 30 L. Ed.2d 296 (1971) (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L. Ed.2d 647 (1969)).

It was the Ninth Circuit Opinion that established a new rule for the circuit that it is error to charge the jury with the elements of the *McDonnell Douglas prima facie* case (Petition for Writ of Certiorari, App. B at 15a-18a) and extensively discussed the circuit split to support its adoption of the newly announced rule, thus, no interests in fair and effective trial administration advanced by Rule 51 would be served if a court refused to reach the merits of the issue as applied to Petitioners. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-56, 101 S.Ct. 2748, 2754, 69 L. Ed.2d 616 (1981).

The Ninth Circuit held that it was error in this case to charge the jury with the elements of the *McDonell-Douglas* formulation since it has a significant potential to confuse juries and "'at [the jury] stage, the framework unnecessarily evades the ultimate question of discrimination vel non.'" (Petition for Writ of Certiorari, App. B, at 17a-18a) (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L. Ed.2d 403 (1983)).

The jury never reached the ultimate question it was required to reach as to whether Petitioners established a case for intentional discrimination by Respondent refusing to connect the facility to its sewer system. (Petition for Writ of Certiorari, App. B, at 20a). Rather, the jury made the credibility determinations as to whether Petitioners had established a prima facie case - a determination that this Court has instructed is beyond the function and expertise of the jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 2106, 147 L. Ed.2d 105 (2000).

By the jury not reaching the ultimate question that it was required to reach, the district court committed plain error that requires reversal.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Petition for Rehearing be granted for decision by this Court or remand to the Ninth Circuit to consider under newly adopted *Federal Rule of Civil Procedure* 51(d)(2) whether the jury instructions charging the jury with the elements of the *McDonnell Douglas* burden-production framework constituted "plain error" requiring reversal of the judgment.

Dated: December 30, 2003

Respectfully submitted,

LAW OFFICES OF
FRANK A. WEISER

Frank A. Weiser
Counsel of Record

Attorney for Petitioners
SMITA SANGHVI and
TARUN SANGHVI

CERTIFICATE OF COUNSEL

I, Frank A. Weiser, certify as follows:

1. I am the attorney for Petitioners in this case. I prepared this Petition For Rehearing of Petition For Writ of Certiorari.

2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition For Rehearing to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

3. This Petition is presented in good faith and not for the purpose of delay.

DATED: December 30, 2003.

Respectfully submitted

LAW OFFICES OF
FRANK A. WEISER

Frank A. Weiser
Counsel of Record

Attorney for Petitioners
SMITA SANGHVI and
TARUN SANGHVI

APPENDIX A

March 27, 2003

Honorable Dick Cheney
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ William H. Rehnquist

March 27, 2003

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 23, 51, 53, 54, and 71A.

[See infra., pp. __ __ __ .]

2. That Forms 19, 31, and 32 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended by replacing all references to "19__" with references to "20__."

3. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2003, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and
(B) with the court's permission file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

(c) Objections.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).